STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 1, 2003
v LEONARD JEROME VASSAR, Defendant-Appellant.	No. 231246 Oakland Circuit Court LC No. 00-171091-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v CASSIUS RUPERT KING, Defendant-Appellant.	No. 231248 Oakland Circuit Court LC No. 00-171092-FH

Before: Hoekstra, P.J., and Smolenski and Fort Hood, JJ.

PER CURIAM.

In Docket No. 231246, defendant Leonard Jerome Vassar was convicted, following a jury trial, of felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony, second offense, MCL 750.227b, and carrying a concealed weapon (CCW), MCL 750.227.[1] He appeals as of right, and we affirm but remand for further proceedings regarding the issue of sentence credit. In Docket No. 231248, defendant Cassius Rupert King was convicted, following a jury trial, of third-degree fleeing and eluding a police officer, MCL 257.602a(3), felon in possession of a firearm, MCL 750.224f, possession of a

[1] Defendant Vassar was sentenced, as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 28 months to 7 ½ years for the felon in possession and CCW convictions, and a consecutive five-year term for the felony-firearm conviction.

loaded firearm in a motor vehicle, non-game area, MCL 750.227c, and two counts of felony-firearm, MCL 750.227b.[2] He appeals as of right, and we affirm.

In late January 2000, police received a citizen report of suspicious activity in the alley behind the Howard's Discount Jewelry Store. At approximately 9:40 a.m., two black males were observed walking back and forth in the alley and hid when a police car drove by the main road. The citizen was unable to identify the men from a distance, but saw them in a blue four-door Dodge Neon. Police were instructed to "be on the lookout" (BOL) for the two men. Police surveillance of the store occurred for a couple of weeks following this report. On February 16, 2000, police observed two black males in a blue Neon parked in a store lot approximately one hundred yards from the jewelry store. An officer began to follow the vehicle, and when backup arrived, attempted to stop the vehicle. Defendant King testified that he fled from police because of outstanding traffic warrants and a suspended license. The pursuit, far exceeding the posted speed limit for a residential area, ended when the Neon crashed into a tree at the end of a no outlet street.

A video camera in the police cruiser recorded defendant King's anticipation of the crash because he opened his door before impact to flee the scene. After a brief foot chase, defendant King was apprehended. The videotape recorded defendant Vassar throwing a loaded .38 caliber revolver from the vehicle. Defendant Vassar denied possession of the gun. He testified that the gun landed on his lap, and he threw it out the window in order to avoid a confrontation with police. Inside the car, police found a cellular phone, a pager, leather gloves, a neoprene ski mask, duct tape, wire cable flex cuffs that police use for mass arrests, a .177 caliber BB gun, and a duffle bag. Defendant King had a pair of steel police type handcuffs and white plastic kitchen trash bags tucked into his clothing. Police found a loaded and chambered sawed-off .22 caliber semi-automatic rifle, a full ski mask, and an earpiece in the area where defendant King fell out of the vehicle. To counter police testimony that the items found in the car were typical of tools used in robberies, defendants' friend testified that the items belonged to him and were left in the car the evening before the arrest during his move. Following a joint trial, the jury convicted, as charged, both defendants.

I. Docket No. 231246

Defendant Vassar first alleges that his dual convictions of felony-firearm and felon in possession of a firearm violate his constitutional protections against double jeopardy. US Const, Am V; Const 1963, art 1, § 15. We disagree. A double jeopardy challenge involves a question of law to be reviewed de novo. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995). Because the felony of being a felon in possession of a firearm, MCL 750.224f, is not among those felonies specifically excluded from the operation of the felony-firearm statute, MCL 750.227b, the Legislature intended to permit dual convictions for both offenses. *People v Dillard*, 246 Mich App 163, 165-169; 631 NW2d 755 (2001). Although the felon in possession

[2] Defendant King was sentenced as an habitual offender, third offense, to concurrent prison terms of forty-three months to ten years for the fleeing and eluding conviction, three to ten years for the felon in possession conviction, and two to four years for the loaded firearm conviction, to be served consecutive to two concurrent two-year terms for the felony-firearm convictions.

statute was enacted after the felony-firearm statute, the Legislature is presumed to have been aware of the felony-firearm statute and its exclusions, and to have purposefully declined to amend it. *Id*. Accordingly, punishing defendant Vassar for both offenses is not a double jeopardy violation.

Defendant Vassar next alleges that he took possession of the weapon under duress, to avoid a potentially deadly confrontation with the police and, accordingly, the evidence was insufficient to support his convictions. We disagree. The sufficiency of the evidence is to be evaluated by reviewing the evidence in the light most favorable to the prosecution. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). The test is whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *Id.* Resolving credibility disputes is within the exclusive province of the trier of fact. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

The prosecution need not negate every reasonable theory consistent with the defendant's innocence, even in a case involving circumstantial evidence. *People v Hardiman*, 466 Mich 417, 424-425; 646 NW2d 158 (2002). The prosecution's burden is to introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide. *Id*. "[I]t is simply not the task of an appellate court to adopt inferences that the jury has spurned." *Hardiman, supra* at 431. In this case, defendant's sufficiency argument is predicated on the credibility of his testimony that he did not know the weapon was in the vehicle until it crashed, and that he took possession of the weapon under duress. However, the credibility of that testimony was for the jury to decide, and it was rejected. We may not substitute our judgment for that of the jury. *Vaughn, supra*. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find defendant guilty beyond a reasonable doubt. *Petrella, supra*.

Defendant Vassar alleges that the police did not have the reasonable suspicion necessary to justify stopping the vehicle he was in and, therefore, the trial court erred in denying his motion to suppress. We disagree. A trial court's decision on a motion to suppress is reviewed for clear error, *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983), but appellate review of a constitutional issue is reviewed de novo. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996). Application of the law to the facts receive de novo review. *People v Barrera*, 451 Mich 261, 269 n 7; 547 NW2d 280 (1996).

Although the trial court did not address the issue of the propriety of the stop, it was supported by reasonable suspicion based on the common sense judgment and deduction by police. *People v Oliver*, 464 Mich 184, 192-194; 627 NW2d 297 (2001). Additionally, we cannot conclude that the trial court's denial of the motion to suppress was clearly erroneous. *Burrell, supra*. The right to be free from unreasonable searches and seizures may only be asserted by the person whose rights were infringed. *People v Zahn*, 234 Mich App 438, 446; 594 NW2d 120 (1999). "Thus, a defendant is said to have 'standing' to challenge a search or seizure if, under the totality of the circumstances, he has a subjective expectation of privacy in the object of the search or seizure, and the expectation of privacy is one that society is prepared to recognize as reasonable." *Id.* at 446. "A person can deprive himself of standing by abandoning the object of the search or seizure." *Id.* at 448. Defendant Vassar did not have an ownership or possessory interest in the car and did not object and claim ownership to personal items in the car. *People v Armendarez*, 188 Mich App 61, 70-71; 468 NW2d 893 (1991).

In a supplemental brief, defendant Vassar raised three issues, only one of which warrants remand.[3] Defendant Vassar alleges that the trial court erred by refusing to grant him sentence credit for time served awaiting trial and sentencing in this case. MCL 769.11b provides that when a person "has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence *shall* specifically grant credit against the sentence for such time served in jail prior to sentencing." This section is "remedial in nature and is to be liberally construed." *People v Johnson*, 205 Mich App 144, 146; 517 NW2d 273 (1994).

Defendant was on parole when he committed the offenses in this case. A parolee who commits a crime while on parole "is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment." MCL 791.238(2). Any sentence imposed for a crime committed while on parole does not begin to run until "the expiration of the *remaining portion* of the term of imprisonment imposed for the previous offense." MCL 768.7a(2) (emphasis added).

However, a parole violator is not automatically required to serve *all* the time remaining of his original sentence, up to the maximum, before he can start serving his new sentence. *Wayne Co Pros v Dept of Corrections*, 451 Mich 569, 571-572, 579-581; 548 NW2d 900 (1996). Rather, "the 'remaining portion' clause . . . requires the offender to serve at least the combined minimums of his sentences, plus whatever portion of the earlier sentence the Parole Board may, because the parolee violated the terms of parole, require him to serve." *Id.* at 572, 584. Accordingly, time served in jail after an arrest for a parole violation is to be credited against the original sentence for which the defendant was on parole, not the sentence imposed for the crime committed while on parole. *People v Watts*, 186 Mich App 686, 687-689; 464 NW2d 715 (1991); see also *Johnson*, *supra* at 146-147. Thus, because a parole violation charge was pending against defendant at the time he was sentenced, the trial court did not err in finding that he was not entitled to credit for jail time served against the sentences imposed in this case.

Nonetheless, it is unclear whether defendant in fact received credit against his original sentence. At the time defendant was sentenced, Department of Corrections Policy Directive 06.06.100(O) required that a parole violation hearing be held within forty-five days of a defendant's return to prison on the new offense or the parole violation charge would be dismissed.[4] The policy also required that a parolee be given credit for jail time served. DOC PD 06.06.100(R). If defendant Vassar did not receive a parole violation hearing upon his return to prison, or if he received a hearing and was not required to serve any additional time on his prior

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[3] The claim of prosecutorial misconduct is without merit because the comments were reasonable inferences arising from the evidence as related to the prosecutor's theory of the case. *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001). Consequently, the claim of ineffective assistance of counsel for failure to object to the prosecutor's comment is also without merit. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). Defendant's claim of ineffective assistance based on the defense of duress is without merit.

[4] That policy has been superseded and, while jail time credit must still be given, a parole violation hearing is no longer required where the parolee has been convicted of a felony while on parole and receives a new sentence for that offense. See DOC PD 06.06.100(D) and (U), effective March 1, 2001.

sentence, there would be no prior sentence against which to credit his jail time served. In that situation, MCL 769.11b would require that defendant be credited with the 281 days of jail time previously served against the sentence imposed in the present case.[5] Therefore, we remand for a determination of the status of defendant's prior sentence for purposes of determining whether he is entitled to credit against the sentence imposed in this case.

II. Docket No. 231248

Defendant King alleges that the prosecutor's case was impermissibly built by pyramiding inference upon inference, absent which the evidence was insufficient to support his convictions. We disagree. Although defendants offered evidence that the guns belonged to someone else, the credibility of their testimony was for the jury to resolve. *Vaughn*, *supra* at 380. Further, our Supreme Court has abrogated the rule that "an inference can not be built upon an inference to establish an element of the offense." *Hardiman*, *supra* at 424, 428, overruling *People v Atley*, 392 Mich 298; 220 NW2d 465 (1974), and its progeny. Rather, the proper test is whether, viewing the evidence and reasonable inferences arising from the evidence in the light most favorable to the prosecution, there was sufficient evidence to support a finding that the defendant was guilty beyond a reasonable doubt. *Hardiman*, *supra* at 431. Considered in this light, the evidence was sufficient to support defendant's convictions.

Affirmed in part and remanded for further proceedings consistent with this opinion in Docket No. 231246. Affirmed in Docket No. 231248. We do not retain jurisdiction.

/s/ Joel p. Hoekstra
/s/ Michael R. Smolenski
/s/ Karen M. Fort Hood

[5] As noted by the *Watts* Court, this Court has no jurisdiction to order that defendant be given credit in the prior case. See *Watts*, *supra* at 687 n 1.